Leiferman Enterprises, LLC d/b/a Harmon Auto Glass *and* International Union of Painters and Allied Trades-District Council 82 and Lighthouse Management Group, Inc. Receiver, Party in Interest. Case 18–CA–18134

February 21, 2008

DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On July 20, 2007, Administrative Law Judge Jane Vandeventer issued the attached decision. The Party in Interest filed exceptions and a supporting brief for itself and on behalf of the Respondent.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found that the Respondent violated Section 8(a)(5) and (1) by refusing the Union's requests for information about the Respondent's merit pay proposal, the dollar amount that nonunit employees contributed toward health care insurance, and the Respondent's financial situation. The judge also found that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing the economic terms of its final offer on August 13, 2006. Finally, the judge found that the Party in Interest, the Respondent's State court-appointed receiver, is the Respondent's agent and therefore personally financially liable to comply with her recommended Order.

As discussed below, we adopt the judge's findings that the Respondent violated Section 8(a)(5) and (1) by refusing to furnish the Union with requested information about health care contributions and the Respondent's financial condition, and by unilaterally implementing the terms of the Respondent's final offer. However, for the reasons set forth below, we find, contrary to the judge, that the Respondent did not violate the Act by failing to provide the Union with requested information about its merit pay proposal, and that the Party in Interest is neither an agent of the Respondent nor personally financially liable to remedy its unfair labor practices.

I. FACTS

The relevant facts, which are fully set forth in the judge's decision, are briefly summarized as follows. The Respondent purchased its business from a predecessor employer in 2004. The Respondent immediately recognized the Union and adopted the collective-bargaining agreement between the Union and the predecessor, which was set to expire on June 30, 2006.[3] In the summer of 2006, the Respondent and the Union engaged in negotiations for a successor collective-bargaining agreement. The parties held four bargaining sessions in June and July. During this bargaining, the Respondent announced that it was experiencing financial stress and needed concessions. The Respondent's proposals included a merit pay provision and another provision requiring unit employees to contribute toward health care insurance to the same extent as the Respondent's nonunit employees.

The Union requested information about the Respondent's merit pay proposal, nonunit employee health care contributions, and the Respondent's financial condition. The Respondent never furnished any of that requested information. The Respondent presented its final offer at the last bargaining session, on July 24. The Union's membership rejected that offer in a ratification vote held on August 9. The Respondent declared impasse on August 10 and implemented the economic terms of its final offer on August 13.

During contract negotiations, the Respondent defaulted on a loan to a secured creditor. On September 20, the secured creditor successfully petitioned a State court to place the Respondent into receivership. The Party in Interest was appointed as the receiver.

II. DISCUSSION

A. Information Regarding the Respondent's Merit Pay Proposal

During negotiations, the Respondent proposed a merit pay provision. Under this provision, it would have been empowered to award merit pay to employees, at its discretion, over and above a specified minimum wage, pro-

[1] The General Counsel's answering brief was rejected as untimely and the Respondent's reply brief was rejected as moot.

[2] We have modified the judge's recommended Order to reflect the violations found and to limit the financial liability of the Party in Interest. Additionally, we have modified the Order to require the Respondent to rescind the unilateral changes only upon request of the Union, because one of the unilateral changes benefited employees. See *Hospital San Rafael*, 308 NLRB 605, 609 (1992), enfd. 42 F.3d 45 (1st Cir. 1994), cert. denied 516 U.S. 927 (1995). We have also added a provision requiring the Respondent to bargain in good faith with the Union before changing a term or condition of employment. See *Provena St. Joseph Medical Center*, 350 NLRB 808, 816 (2007). We have modified the notice to conform it to the language of the Order.

Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[3] All dates are in 2006, unless noted otherwise.

vided that it not do so in a discriminatory or arbitrary manner. On several occasions, the Union asked the Respondent's negotiator to furnish the goals, objectives, and standards that would govern the award of merit pay under the Respondent's proposal. In response, the Respondent's negotiator explained that no such goals, objectives, or standards existed and that merit pay would be granted entirely at the Respondent's discretion.

The General Counsel alleged, and the judge found, that the Respondent violated Section 8(a)(5) and (1) by refusing to furnish the Union with the requested goals, standards, and objectives of its merit pay proposal. The Respondent excepts, arguing that its proposal was not for a standards-based system, and that the requested information did not exist. We find merit in these exceptions.

"[W]hen requested information is presumptively relevant or has been demonstrated to be relevant, the burden shifts to the respondent to establish that the information is not relevant, *does not exist*, or for some other valid and acceptable reason cannot be furnished to the requesting party." *House of Good Samaritan*, 319 NLRB 392, 398 (1995) (emphasis added); cf. *Whittier Area Parents' Assn.*, 296 NLRB 817, 817 fn. 2 (1989) (dismissing complaint allegation where requested information did not exist). The parties agree that the requested information would be relevant to the Union's duties if it existed. However, we find that the Respondent satisfied its burden of proving that the requested information did not exist. Douglas Seaton, the Respondent's attorney and negotiator, testified without contradiction that there were no goals, objectives, or standards that would govern the award of merit pay under the Respondent's proposal, and that merit pay would be a matter within the Respondent's discretion. Having found that the Respondent satisfied its burden of proving that the requested information did not exist, we reverse the judge and dismiss this complaint allegation.[4]

B. Information Regarding the Amount that Nonunit Employees Contributed to Health Care Insurance

During the final bargaining session on July 24, the Respondent proposed—for the first time—that unit employees contribute "the same share or dollar amount towards the cost of [health] insurance benefits as is paid by similarly situated non-bargaining unit employees of the Employer."[5] That proposal prompted the Union's negotiator to orally request that the Respondent furnish *the dollar amount* contributed by such similarly situated nonunit employees. The Respondent's representative replied that the nonunit employees' current share was 50 percent of the required contributions, and that the Respondent retained discretion to increase or decrease that share. The Respondent's representative then stated that he could not furnish the dollar amount of nonunit employees' contributions because that amount was dependent on an employee's individual circumstances, including health condition and number of dependents. The representative did disclose, however, the dollar amount that he personally contributed toward his own health care insurance. Although the Union's negotiator did not express dissatisfaction with that response during the July 24 bargaining session, the Union again requested the dollar amount of the nonunit employees' contributions in letters dated August 18 and September 8. The Respondent never furnished that information.

We agree with the judge that the Respondent unlawfully failed to provide this requested information. We reject the Respondent's argument that its representative's response satisfied its duty to provide information under Section 8(a)(5) and (1). The Respondent never informed the Union of the dollar amounts that the similarly situated nonunit employees contributed toward their health care insurance. Moreover, the Respondent failed to prove that the information did not exist or provide an otherwise valid reason for not furnishing it.

We likewise reject the Respondent's argument that it had no duty to furnish information regarding nonunit employees' dollar contributions because the Union requested this information in bad faith to forestall a bargaining impasse and avoid the Respondent's unilateral implementation of its last offer. Bad faith is an affirmative defense that must be pleaded and proved by the Respondent. *Honda of Hayward*, 314 NLRB 443, 449 (1994). In *Honda of Hayward*, the Board held that a respondent was procedurally barred from raising its bad-faith affirmative defense where it failed to plead that affirmative defense in its answer or raise it during the unfair labor practice hearing. Here, similarly, the Respondent failed to plead the defense in its answer or raise it during the hearing. Consequently, the Respondent is procedurally barred from raising it in its postdecision exceptions.

Even assuming that the affirmative defense was properly raised, we would reject it on the merits. Nothing in

[4] We disavow the judge's implied finding that the Respondent engaged in bad-faith bargaining in violation of Sec. 8(a)(5) and (1) by refusing to negotiate over goals, objectives, or standards to govern merit pay. The complaint does not allege such a violation. Moreover, the record does not establish that the Union asked the Respondent to bargain over goals, objectives, or standards, or that the Respondent thereafter refused.

[5] The record is silent regarding whether the similarly situated nonunit employees are covered by the same health-care plan that covered unit employees under the expired collective-bargaining agreement.

the record demonstrates that the Union requested the information in bad faith. See *AK Steel Corp.*, 324 NLRB 173, 184 (1997) ("good-faith requirement is met if at least one reason for the demand can be justified"). To the contrary, the record reveals that the Union requested the information to knowledgably evaluate the Respondent's offer.

C. Information Regarding the Respondent's Financial Situation

During several of the bargaining sessions, the Respondent's negotiator stated that the Respondent was experiencing financial difficulties. On July 24, for example, he informed the Union's negotiator, "We are not going to be able to manage to continue the business unless we make these changes," referring to the changes contained in the Respondent's proposal. That day, the Union asked the Respondent's negotiator for financial information that would verify the claim. The Union repeated its requests for the information in letters dated July 31, August 14 and 18, and September 8. The Respondent never furnished any financial information to the Union.

The judge found that statements made by the Respondent's negotiator triggered a duty to furnish information about the Respondent's financial situation. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). The Respondent does not except to that finding and, consequently, we adopt it pro forma.

The Respondent's sole defense to this complaint allegation is that the Union allegedly requested the financial information in bad faith, to forestall impasse and to avoid implementation of the Respondent's last offer. As explained above, the Respondent is procedurally barred from raising the bad-faith affirmative defense because it failed to plead it in its answer or raise it at the unfair labor practice hearing. *Honda of Haywood*, 314 NLRB at 449.

But even assuming that the bad-faith affirmative defense had been properly raised, we would reject it on the merits. The Respondent urges the Board to infer bad faith from the fact that the Union did not request the financial information until the final bargaining session and because several of the requested items are alleged to be irrelevant to verifying the Respondent's claimed inability to pay. We find that the record does not demonstrate that the Union lacked a good-faith reason for the information request. In particular, we do not find it suspicious that the Union requested financial information for the first time on July 24. It was not until that bargaining session that the Respondent's negotiator clearly stated that the Respondent could not remain in business if its proposal was not accepted. Nor does the nature of the information requested (e.g., lists of customers and prices, among other information) demonstrate that the Union requested the information solely to avoid impasse and implementation.

D. Unilateral Implementation

We affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing the economic terms of its final offer on August 13. We agree with the judge, for the reasons she states, that the Respondent's unfair labor practices precluded a genuine impasse and that, even apart from the Respondent's unfair labor practices, the Respondent failed to prove that the parties had bargained to impasse.

We reject the Respondent's argument that its unilateral action should be excused because of exigent economic circumstances. The duty to bargain in good faith includes a duty to refrain from unilaterally changing a term or condition of employment without first bargaining to impasse or agreement. *NLRB v. Katz*, 369 U.S. 736 (1962). However, an employer may lawfully make a unilateral change "when economic exigencies compel prompt action." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). The Board has limited this exception to "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'" RBE *Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995) (quoting *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995)). The burden is on the Respondent to prove that it experienced such dire and unforeseen circumstances, and that burden is "heavy." *Alpha Associates*, 344 NLRB 782, 785 (2005).

We find that the Respondent failed to prove that its economic exigency was "unforeseen," as required by our precedent.[6] In support of its defense, the Respondent relies on the fact that its sales revenue was down significantly throughout 2006 when compared to 2005, resulting in a net loss of approximately $848,000 in 2006. It also relies heavily on the fact that it was placed into receivership by a State court on September 20. But these facts do not demonstrate that the Respondent experienced an unforeseen economic exigency. First, we have previously held that a similar decline in sales revenue over many months is not the kind of unforeseen exigency that would excuse unilateral action. *Toma Metals, Inc.*, 342 NLRB 787 (2004) (employer's 50-percent decline in sales revenue over 6 months was a chronic condition, and

[6] The Respondent does not argue that we should overrule or reconsider our precedent relating to the unforseeability requirement. Consequently, Member Schaumber expresses no view as to whether that precedent should be reconsidered.

did not excuse a unilateral layoff). Second, the Respondent failed to prove that its placement into receivership was an unforeseen event. In April, 4 months before the unilateral implementation, the Respondent entered into a forbearance agreement with a secured creditor on a $2.5 million loan. The Respondent failed to make "numerous" payments to the secured lender and was placed into receivership on September 20. In these circumstances, we find that the Respondent failed to satisfy its heavy burden of proving that the receivership or any other customary consequence of its repayment delinquency was unforeseen. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing the economic terms of its final offer.

E. The Liability of the Party in Interest

The judge found that the Party in Interest, the Respondent's State court-appointed receiver, was the Respondent's agent, and therefore obligated to fully comply with the recommended Order. The recommended Order does not place any limit on the Party in Interest's financial liability. Thus, to comply with the recommended Order, the Party in Interest might have to expend its own funds to make whole unit employees for any loss they suffered as a result of the Respondent's unfair labor practices.

The Party in Interest excepts to the recommended Order and urges the Board to modify the Order to limit its financial liability to the assets held in receivership. We find merit in this exception. The judge's agency finding is contrary to *Cone-Heiden Corp.*, 305 NLRB 1045 (1991). In *Cone-Heiden*, the Board held that an employer's receiver was not the employer's agent, but rather a fiduciary of the employer's creditors. Thus, agency principles do not provide a basis for holding the Party in Interest personally financially liable to remedy the Respondent's unfair labor practices.[7] Accordingly, we grant the Party in Interest's exception and modify the Order to limit its financial liability to the assets held in receivership.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Leiferman Enterprises, LLC d/b/a Harmon Auto Glass, Minneapolis, Minnesota, its officers, agents, successors, and assigns, and its receiver Lighthouse Management Group, Inc., shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with the International Union of Painters and Allied Trades–District Council 82 (the Union), as the exclusive collective-bargaining representative of employees in the unit described below, by failing and refusing to furnish relevant information requested by the Union.

(b) Failing and refusing to bargain collectively with the Union by unilaterally implementing changes in terms and conditions of employment in the absence of a lawful bargaining impasse.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a timely manner the information it requested on July 24 and 31, August 14 and 18, and September 8, 2006, except for the requested information regarding the merit pay proposal.

(b) Upon request of the Union, rescind the unilaterally implemented changes in terms and conditions of employment of bargaining unit employees that were put into effect on August 13, 2006.

(c) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of its employees in the following appropriate unit:

> All full-time and regular part-time employees employed by the Company within the Twin Cities and immediate suburbs; excluding all other employees of the Company, Inside Sales Representatives (ISRs), Business Leads, and/or Shop Managers as defined in the Act.

(d) Upon request of the Union, resume collective-bargaining negotiations with the Union.

(e) Make employees whole for any loss of earnings and other benefits suffered as a result of the unlawful actions taken against them in the manner set forth in the remedy section of the administrative law judge's decision, provided that the financial liability of the Party in Interest, Lighthouse Management Group, Inc., shall be limited to the assets in the receivership.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, so-

[7] The General Counsel did not plead in his complaint or argue that the Party in Interest is personally liable to remedy the Respondent's unfair labor practices as a successor under *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). Consequently, we need not and do not address whether successorship principles provide a basis for finding the Party in Interest personally financially liable in this case. *Specialty Envelope Co.*, 321 NLRB 828, 831 (1996), enf. denied in part on other grounds sub nom. *Peters v. NLRB*, 153 F.3d 289 (6th Cir. 1998).

cial security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Minneapolis-area locations copies of the notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 24, 2006.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provide by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

[8] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT fail or refuse to bargain collectively with the International Union of Painters and Allied Trades–District Council 82 (the Union), as your exclusive collective-bargaining representative by failing to furnish relevant information requested by the Union in the following appropriate unit:

> All full-time and regular part-time employees employed by us within the Twin Cities and immediate suburbs; excluding all other employees of the Company, Inside Sales Representatives (ISRs), Business Leads, and/or Shop Managers as defined in the Act.

WE WILL NOT fail or refuse to bargain collectively with the Union by unilaterally implementing changes in your terms and conditions of employment in the absence of a lawful bargaining impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish to the Union in a timely manner the information requested by the Union on July 24 and 31, August 14 and 18, and September 8, 2006, except for the requested information regarding the merit pay proposal.

WE WILL, upon request of the Union, rescind the unilaterally implemented changes in terms and conditions of employment of bargaining unit employees that were put into effect on August 13, 2006.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively and in good faith with the Union as your exclusive representative.

WE WILL, upon request of the Union, resume collective-bargaining negotiations with the Union.

WE WILL make you whole for any loss of earnings and other benefits you suffered as a result of the unlawful actions taken against you, with interest.

LEIFERMAN ENTERPRISES, LLC D/B/A HARMON AUTO GLASS

David M. Biggar, Esq., for the General Counsel.
Douglas P. Seaton, Esq. and *Jon Olson, Esq.,* for the Party in Interest.

DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on January 25 and 26, 2007, in Minneapolis, Minnesota. The complaint alleges Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide the Charging Party Union with information which was relevant and necessary to collective-bargaining negotiations. The complaint also alleges Respondent violated Section 8(a)(5) of the Act unilaterally implementing changes in employees' terms and conditions of employment in the absence of a lawful impasse. The Respondent and the Party in Interest, the receiver, Lighthouse Management Group, Inc. (Lighthouse) jointly filed an answer denying the essential allegations in the complaint. The answer was filed by Attorney Douglas Seaton on November 15, 2006, at which time he represented both Respondent and Lighthouse. At the hearing herein, Douglas Seaton stated on the record that he was appearing as attorney for Lighthouse only, and not for Respondent. He also gave evidence as described below. After the conclusion of the hearing, the General Counsel and Lighthouse filed briefs which I have read.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and places of business in Minneapolis, Minnesota, where it is engaged in the retail sale and installation of automotive glass. During a representative 1-year period, Respondent derived gross income in excess of $500,000 and purchased and received at its Minneapolis facilities goods valued in excess of $50,000 directly from points outside the State of Minnesota. Accordingly, I find, as Respondent and Lighthouse admit, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Respondent Harmon Auto Glass is a company with numerous retail locations in the Minneapolis area. It was owned by a company called The Dwyer Group until April 2004, at which time Respondent Leiferman Enterprises, LLC purchased the business and continued to operate it in the same manner as previously, and using the same employees. It is undisputed that Respondent recognized the Union and adopted the collective-bargaining agreement which was then in effect between the Union and Harmon Auto Glass.[1] The term of that agreement was July 1, 2003, through June 30, 2006. Subsequently, in 2005, Respondent was charged by the Union with failing to make certain benefit payments to a 401(k) plan called for in the collective-bargaining agreement, and a complaint was issued by the NLRB Regional Director. That complaint was settled, and the settlement agreement is still in existence. It was agreed by the parties at trial that the prior settled charges have no bearing on the instant matter.

The Union has represented Respondent's employees in the following unit for over 20 years:

> All full-time and regular part-time employees employed by the Company within the Twin Cities and immediate suburbs; excluding all other employees of the Company, Inside Sales Representatives (ISRs), Business Leads, and/or Shop Managers as defined in the Act.

The Union has been recognized as the collective-bargaining representative of the unit employees by Respondent since Respondent purchased the business in April 2004.[2]

It was admitted that Scott Leiferman is the owner of Respondent and that Jeff Barr was the vice president of Respondent through September 2006. Jeff Barr appeared at the hearing as the designated representative of Lighthouse. Barr did not testify.

2. Bargaining for a successor contract in 2006

In June 2006, the Union and Respondent met to commence negotiations for a successor contract. There were four meetings during June and July 2006[3]—June 16 and 28 and July 18 and 24. A fifth bargaining session had been scheduled for July 31, but was not held. The Union was represented by Michael Gavanda, business manager and secretary-treasurer, and Russell Pavlak, business representative.[4] Respondent was represented in bargaining by Attorney Douglas Seaton and Vice President Jeff Barr.

On June 16, the parties met for about 2 hours. The Union presented its bargaining proposal to Respondent. The parties discussed the Union's proposal and the then-outstanding complaint relating to 401(k) plan benefit payments. The major change proposed by the Union was a return to the previous defined benefit plan for pension, rather than the 401(k) plan which the Union had negotiated with the Dwyer Group. The parties also discussed what Respondent intended to propose, such as merit pay. Seaton stated that Respondent was having financial trouble and was "bleeding money." Seaton stated that Respondent could make its payroll or pay the owed 401(k) payments, but was unable to do both. Seaton also stated that Respondent could not afford to continue the current collective-bargaining agreement, and that its proposal, when presented at the second meeting, would be "harsh" because of its financial condition.

On June 28, the parties again met for about 2 hours. Most of the session was consumed with going over Respondent's proposal article by article. Respondent's proposal contained changes in the pay system, both a two-tier wage scale, and a "merit pay" proposal. At the meeting, Gavanda asked for the

[1] While Respondent denied in its answer that it had adopted the collective-bargaining agreement, the evidence at trial showed that it indeed adopted the collective-bargaining agreement. Counsel for Lighthouse represented on the record that Respondent had adopted the collective-bargaining agreement.

[2] Attorney Seaton stated at the hearing that the Respondent purchased the business in February 2004, but no evidence was introduced on this point. In any case, whether Respondent purchased Harmon Auto Glass in February or April 2004 is not material to the findings and conclusions below.

[3] All dates hereafter are in 2006, unless otherwise specified.

[4] Pavlak was present for only three of the four bargaining sessions. He was absent from the July 18 session.

goals, objectives, and standards by which merit pay was to be awarded. Seaton responded that there were none, and that essentially it was entirely within the discretion of Respondent. Respondent's proposal contained a 401(k) plan, but there were no required contributions. These, too, were entirely within the discretion of Respondent. Respondent's proposal for health insurance required the employees to increase the share of health insurance they paid from 25 percent of the cost to 50 percent of the cost. The Union stated that it needed time to evaluate Respondent's many proposed changes, and would respond at the next bargaining session, which was scheduled for July 12. The parties agreed to an extension of the collective-bargaining agreement through July 13. Seaton stated that time was important, and that Respondent needed to complete the negotiations quickly.

Due to a funeral, the third meeting was rescheduled to July 18, and lasted about 3 hours. The Union presented responses to Respondent's proposals. Several agreements were reached as the parties went through the proposals. The Union indicated that it was willing to work out a system which would minimize or eliminate pyramiding of overtime, and indicated a willingness to agree to employees' paying some increased portion of health insurance premiums. The "merit pay" or production based pay was discussed for a considerable period, along with the proposed lower rate for new hires. Gavanda asked questions about the goals or objectives which would be applied so that an employee would know what would qualify him for merit pay. Gavanda stated that he needed the information in order to explain the proposal to employees. Seaton responded that there were no goals or objectives, and the awarding of merit pay would be discretionary with Respondent. Seaton testified he was aware that several of Respondent's proposals had legal implications, and that the Union had asked its attorney to evaluate those proposals. The Union further stated that it would drop its proposal to return to the defined benefit plan for pensions and health coverage. Seaton again stated that Respondent needed to save a great deal of money in order to continue in business. The parties agreed to two further bargaining sessions, one on July 24 and another on July 31. Seaton testified that he stated to the Union that the parties should be able to get to their final positions at the July 24 meeting and to be in a position to respond to a final offer at the July 31 meeting.

The July 24 meeting was scheduled to begin at nine in the morning. Respondent began the meeting by presenting a modified written package to the Union. Seaton stated that he would present it and talk about it, and hear the Union's response, that he wanted to make a final offer during the course of the day, and that he hoped the parties could get an agreement that day. The parties spent about an hour going over Respondent's modified proposal. The Union requested a caucus to consider the proposal. After a caucus of about 3 hours, the parties reconvened, and the Union responded. The Union reiterated that it was dropping its demand for a return to the defined benefit pension plan, but countered that Respondent's plan guaranteed nothing to employees. The Union proposed continuing the 401(k) contribution as in the expired contract. The parties agreed on two aspects of the modified proposal, articles 4.08 and 14.09. Seaton stated that Respondent was "hemorrhaging money," and that it couldn't continue to move in the direction it was going and stay in business. Seaton admitted that although he did not mention bankruptcy, he said "in every other way . . . the company is in trouble." He admitted stating that the Company would not be "viable," would not be "profitable," and would not be able to "continue the business" unless Respondent secured all the changes to the collective-bargaining agreement that it was seeking.[5] Gavanda then requested financial information to justify the dramatic cuts Respondent was proposing, for example that there would be no required contributions to the 401(k) plan, and those employees would have to pay for one-half of the cost of health insurance. Pavlak testified that he requested the comparable cost that nonunit employees paid for health insurance. The Union again requested information about the operation of the proposed merit pay proposal, and Seaton said there was no information about its operation. Seaton told the Union that this was Respondent's final proposal. The Union did not agree to it, but told Seaton that it would be submitted to the bargaining unit employees for their approval or disapproval, but that the Union would not recommend it, because of the lack of information about Respondent's economic condition, and about the merit pay proposal. Seaton stated that there was no need for any further meetings, and cancelled the July 31 meeting.

On July 26, Respondent sent the Union another copy of its final contract offer from the July 24 session. On July 31, the Union responded by letter, reiterating its request for financial information to justify the drastic economic concessions demanded by Respondent.[6] By letter of August 4, Respondent refused to provide any financial information.

The bargaining unit employees rejected the Respondent's offer on August 9. Respondent apparently was informed of this fact, and on August 10, wrote a letter to the Union stating that the parties were at impasse and the Respondent would implement the economic portions of its final offer on August 13. By letter dated August 14, the Union stated that it did not consider the parties to be at impasse. The letter also informed Respondent that the Union was amenable to considering certain of Respondent's proposals. It is undisputed that Respondent implemented its July 24 economic proposals on August 13.

3. Respondent placed in receivership

On September 20, pursuant to a complaint filed in State court by Respondent's creditors, Respondent was placed into receivership by a State court judge in Hennepin County, Minnesota. The Party in Interest (Lighthouse) was named the receiver. The receiver was ordered to operate the business of Respondent, and to take control of its financial and other records, and its

[5] Much of the testimony of the bargaining witnesses for both Respondent and the Union was substantially consistent. Where there are material differences, however, I specifically find that Gavanda and Pavlak are more worthy of credit that Seaton. Seaton's testimony was often couched in conclusory or argumentative language, as opposed to straightforward factual language. His demeanor was not impressive, and he contradicted himself on several occasions.

[6] The same letter requested Respondent's 401(k) plan, a copy of which was later provided to the Union. The request for information about the 401(k) plan is not an issue here.

assets. Lighthouse was further ordered to sell the businesses, if possible, and to continue to take normal actions necessary to operation of the business. The normal powers necessary to operate the business were conferred on Lighthouse, such as the power to hire employees, to pay bills, to order supplies, and to make contracts.

Seaton represented both Lighthouse and Respondent for a period of several months after September 20, and in fact filed an answer to the complaint herein in that capacity. At the time of the hearing, however, he stated that he represented only Lighthouse. Jeff Barr, the individual designated as the representative at trial of Lighthouse, had been the vice president of Respondent during the time of the 2006 bargaining. At the time of the hearing, no other entity had purchased Respondent.

Since that time, the only two meetings which took place between the Union and Respondent appear from the evidence to have been updates of the receiver's efforts to find a new buyer for Respondent, and efforts to settle the instant case. It is clear from the record evidence, and I find, that no further bargaining took place between the parties.

B. Discussion and Analysis

1. Respondent's admitted failures to provide information

It is undisputed that the Union requested information concerning Respondent's health care insurance costs, i.e., the precise amounts unit employees would be expected to pay under its bargaining proposal, and it is equally undisputed that Respondent failed to provide the Union with this information. There is likewise no dispute that information regarding the cost unit employees would be required to pay is presumptively relevant. Lighthouse's witness, Seaton, defended Respondent's and his own conduct in failing to provide the Union with this information by merely characterizing the Union's request as a stalling tactic and a "game." The record reveals no evidence of any bad faith on the part of the Union in making its information requests. The Act does not regard information concerning employees' compensation in so cavalier a manner; rather, under settled Board law, an employer's failure to provide such relevant information violates the duty to bargain and is an unfair labor practice. See, e.g., *B & B Trucking*, 345 NLRB 1, 5 (2005); *V & S Schuler Engineering*, 332 NLRB 1243, 1244 (2000); *Beverly Health & Rehabilitation Services*, 328 NLRB 959, 963 (1999); *JRED Enterprises, Inc.*, 313 NLRB 1244 fn. 1 and 2 (1994).

The Union's second major request for information concerned the goals and standards to be used by Respondent in applying its merit pay proposal. It is undisputed that this request was made during bargaining, and Respondent admittedly provided nothing in response to this request. Respondent stated to the Union during bargaining and reiterated at the hearing, presumably as its defense, that there were no goals or standards, and that there existed no information Respondent was able to provide. Both in negotiations and at the hearing, Respondent characterized its merit pay proposal as a way to encourage productivity and provide an incentive to employees, yet it claimed to have no threshold of productivity which would trigger neither additional pay, nor the amount of such pay if it were awarded to an employee. Absent such standards or thresholds, therefore, the merit pay proposal as written was totally within the control of Respondent, who could decide on a whim whether merit pay was payable or not, how much, when, and on what basis. Respondent could change the standards at will, or could decide never to pay any merit pay. In other words, Respondent's proposal was entirely discretionary. The Board has held that when an employer proposes such a "merit pay" system of compensation, there must be *some* governing principles to the system, and the employer must provide the union with information about the operation of the system. See, e.g., *Detroit Newspaper Agency*, 326 NLRB 700, 706 (1998), enf. denied 216 F.3d 109 (D.C. Cir. 2000); *McClatchy Newspapers*, 321 NLRB 1386, 1391 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998).

Where, as here, an employer is offering its merit pay proposal as an alleged benefit in trade for its admittedly concessionary proposal of *no* guaranteed contributions to the 401(k) retirement plan, it is entirely rational for a union to try to find out what the merit pay plan consists of. No party to negotiations would knowingly trade something for nothing, or something for an unknown quantity, a "pig-in-a-poke." If Respondent had goals, standards, or definable objective procedures and criteria to govern its proposal, Respondent was obligate to provide these to the Union. Its failure to do so violated its duty to bargain, and Section 8(a)(5) of the Act. If Respondent had no goals, standards, or definable objective procedures and criteria to govern its merit pay proposal, then it was obligated to bargain them with the Union. Respondent refused to do so, proffering the merit pay proposal as a take-it-or leave-it choice. By so doing, and by declaring impasse when it had failed to bargain appropriately about its merit pay proposal, Respondent showed bad faith, and violated Section 8(a)(5) of the Act.

The Union's third request for information concerned financial data to support Respondent's claims that its July 24 proposal was all that it could afford to offer. It is undisputed that the Union requested this information orally at the July 24 bargaining session and reiterated its request in a letter dated July 31. It is likewise undisputed that Respondent refused to provide any financial information to the Union, citing in its refusal letter the facts that it was not about to file bankruptcy, and that it had not "pled poverty." It is well settled that an employer who claims that it cannot afford to pay more than is contained in its final offer is obligated to substantiate that claim by providing financial information to the union with whom it is bargaining. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). No particular "magic words" need be stated to trigger this obligation, and each case must turn on its particular facts. Here, Respondent's apparent insistence that it did not plead poverty is utterly contradicted by the totality of its conduct at the bargaining table, such as its statement that Respondent was "hemorrhaging" money, and could not survive in business unless its concessionary proposals were accepted. Seaton's testimony as a whole could not be clearer. He specifically testified that he told the union negotiators in as many ways as he possibly could that Respondent was in a dire financial condition. I find that Respondent's conduct at the bargaining table amounted to a claim that Respondent could not afford to offer anything more than what was in its final offer. Respondent was therefore obligated to provide the Union with the financial justification which the Union requested. As Respondent did not do so, it violated its duty to bargain and Section 8(a)(5) of the Act. *AMF Trucking & Warehousing*, 342 NLRB 1125, 1126 (2004); *Lakeland Bus Lines*, 335 NLRB 322 (2001), enf. denied 347 F.3d 955 (D.C. Cir. 2003); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984).

2. Respondent's declaration of impasse and implementation of changed terms and conditions of employment

It is admitted that Respondent put into effect changed terms and conditions of employment on August 13, which reflect the economic portions of its final bargaining proposal of July 24. Board law requires that during contract negotiations, an employer may not unilaterally implement changes or proposals unless the union agrees to the implementation, or impasse has been reached. Here, Respondent implemented its final proposal which contained two particular terms about which the Union had requested information, the health care costs and the merit pay plan, and which Respondent had violated the Act by refusing to provide. In addition, Respondent had also violated the Act by its refusal to provide information about its financial condition—information which was relevant to an intelligent evaluation of its entire concessionary bargaining proposal. In the face of violations of the Act which constituted direct and substantial roadblocks to the progress of collective bargaining, no valid impasse was possible. Respondent impeded the normal course of negotiations by its refusal to provide these three vitally important types of information. Where a respondent has committed unfair labor practices which inhibit bargaining as Respondent did here, no lawful impasse can be reached. *Circuit-Wise, Inc.*, 309 NLRB 905, 918 (1992).

It is appropriately Respondent's burden to demonstrate that an impasse exists, as Respondent is the party seeking to defend its unilateral implementation of changed terms and conditions of employment. The overall conduct of the bargaining herein further undermines Respondent's unsupported claim that the parties had reached an impasse by the end of the day on July 24. Good-faith bargaining is a prerequisite to lawful impasse. Here, there were only four bargaining sessions before Respondent declared impasse, and three of them lasted only 2 or 3 hours each. Only one was nearly a full day, making a total of 15 or fewer hours of negotiations in a situation where one party, Respondent, was demanding radical changes. The first two sessions were used to present first one party's proposal and then the other party's proposal. Thus, there were only two sessions at which real give-and-take could occur. At the third session, there was some movement by each side, and some few agreements made. At the fourth session, Respondent presented a modified proposal in the morning, went over it, and heard the Union's response. Respondent then basically converted its modified proposal into a "take-it-or-leave it," "last and final" proposal, and stated that if the Union did not agree to it, there was no need for any further bargaining, because that was all the Respondent could afford. At the fourth session, the Union had made some movement toward the Respondent's proposal, and had asked for the three types of information outlined above. Notwithstanding the incompleteness of discussion of the subjects about which information was requested, as well as the incompleteness of discussion of other areas of the proposal, Respondent insisted that bargaining was at an end. The Union held a vote among employees on Respondent's final offer, and following the rejection of the final offer by the employees, offered to get back together to continue negotiations. Respondent was not justified in assuming the employees' rejection was evidence of an impasse, especially in light of the Union's letter offering to resume negotiations, and indicating areas where the concessions needed by Respondent could be explored further. The very short amount of time spent by the parties in actual bargaining, not more than 2 8-hour days in total, along with the large number of significant changes and concessions under discussion militate against the likelihood of a true bargaining impasse. See, e.g., *EAD Motors Eastern Air Devices,* 346 NLRB 1060, 1062–1064 (2006); *Lancaster Nissan*, 344 NLRB 225, 228 (2005); *Royal Motor Sales*, 329 NLRB 760, 761–764 (1999).

Thus, based on its conduct in prematurely terminating bargaining, as well as on the impossibility of a lawful impasse where, as here, Respondent violated the Act by refusing to provide information necessary to the progress of bargaining, I find that Respondent violated Section 8(a)(5) of the Act by unilaterally implementing changed terms and conditions of employment of the bargaining unit employees.

3. Obligations of the Party in Interest

The General Counsel named Lighthouse as a Party in Interest in the complaint herein, but made no specific unfair labor practice allegations against Lighthouse. Notably, the General Counsel did not plead and does not contend that Lighthouse is a successor employer to Respondent. Instead, the General Counsel argues that Lighthouse must act in its capacity as receiver to take whatever action may be ordered by the Board, citing Section 2(1) of the Act and *Holiday Inn Coliseum*, 300 NLRB 631 (1990).

Respondent argues that by virtue of its status as a receiver, it is automatically relieved of any obligation to take any actions to remedy Respondent's unfair labor practices as a matter of law. Respondent relies on a Sixth Circuit case which enforced a Board decision, but only in part. In *Peters v. NLRB*, 153 F.3d 289 (6th Cir. 1998), the court considered a Board case decided as *Specialty Envelop Co.*, 313 NLRB 94 (1993), in which the Board had found that an individual named Peters had acted as a receiver for an ailing company, and subsequently had formed another company, Specialty Envelop Company, which had purchased the ailing company. The Board found that Peters was a successor employer under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and that Specialty Envelop Company was a successor under *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). The Sixth Circuit court of appeals enforced the Board's order as to Peters, but denied enforcement as to the second successor, Specialty Envelop. The court reasoned that Specialty Envelop had not had an opportunity to bargain with the original company about the purchase price, and therefore, it would be inequitable to hold it liable to remedy the original company's unfair labor practices as a *Golden State* successor. Respondent's contentions are far a field from the situation in this case. There has been no allegation of successorship, nor has there been a subsequent sale of the business, and therefore the *Peters* case is inapposite.[7] Likewise, the court in *Peters* made no announcement of a bright line rule, it merely addressed the particular factual situation it faced, a rather unusual factual situation. Even if *Peters* were to govern the instant situation, Lighthouse's role in the instant case is analogous to that of Peters, the *Burns* successor, not to that of Specialty Envelop.[8]

To the extent Lighthouse argues that it did not have notice of the unfair labor practices committed by Respondent, I find that argument disingenuous to the point of speciousness. It is undisputed that Seaton represented Respondent, was the primary agent of Respondent during bargaining negotiations, and for a period following the appointment of Lighthouse as receiver, represented both Respondent and Lighthouse for several months. It is similarly undisputed that Jeff Barr, vice president for Respondent, was also present at the bargaining negotiations, and that he acted as Lighthouse's representative at the trial herein. It beggars common sense, and I refuse to find, that the minds of either of these two individuals became tabula rasa on September 20. The conduct they had participated in was still contained in their memories, whether they were agents of Respondent or of Lighthouse. The knowledge of the conduct of bargaining during their tenure as agents of Respondent is therefore attributable to Lighthouse, of whom they are now agents, and I so find.

A straightforward analysis in the present case must begin with the issue of Lighthouse's role as a receiver. The State court designated Lighthouse as the receiver on September 20, after the unfair labor practices found herein had occurred. As summarized above, it was charged to manage Respondent in a responsible manner, and was empowered to exercise normal managerial powers in that duty. Lighthouse, as a receiver, is therefore a kind of agent or manager of Respondent. The Act includes receivers within the definition of a "person" within the meaning of the Act at Section 2(1). The Board has had occasion to decide this question in *Holiday Inn Coliseum*, above. The Board there pointed out that the receiver had been appointed to manage, control, and protect the hotel, and was not only a person within the meaning of Section 2(1) of the Act, but was likewise an agent within the meaning of Section 2(2) of the Act. The Board stated that "where the State has a temporary interest in the employing entity . . . we find the situation most closely analogous to bankruptcy trustees, over whom we do assert jurisdiction. See, e.g., *Karsh's Bakery*, 273 NLRB 1131 (1984)." 300 NLRB at 631 fn. 4.

Therefore, I find that Lighthouse, as receiver for Respondent, is an agent of Respondent within the meaning of the Act, based on the powers and duties conferred on it by the State court order, and is therefore obligated to carry out Respondent's business obligations in accordance with the law, including the Act. I specifically find, and will include this finding in my recommended Order, that Lighthouse is obligated to carry out the terms of any Order issued by the Board.

CONCLUSIONS OF LAW

1. The Union is the collective-bargaining representative of the employees in the following appropriate bargaining unit:

> All full-time and regular part-time employees employed by Respondent within the Twin Cities and immediate suburbs; excluding all other employees of Respondent, Inside Sales Representatives (ISRs), Business Leads, and/or Shop Managers as defined in the Act.

2. By failing and refusing to provide relevant information requested by the Union, Respondent has refused to bargain with the Union and has violated Section 8(a)(5) and (1) of the Act.

3. By unilaterally changing the terms and conditions of employment in the absence of a lawful bargaining impasse, Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. I shall recommend that Respondent be ordered to rescind the changes to terms and conditions of employment that it made on August 13, 2006, and that it be ordered to make employees whole for any loss of earnings and other benefits suffered as a result of the unlawful actions taken against them in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

[7] Even if the *Peters* case were on point, it would be merely persuasive, not dispositive, as it was decided in a circuit court of appeals different from the Eighth Circuit, where the instant case arose. The issue in *Peters* has not been addressed by the Supreme Court, and Board law is to the contrary. I find that it is unpersuasive of Respondent's contention.

[8] It is unnecessary to reach the issue of whether Lighthouse is a successor under Board law, and therefore I do not decide the issue. It is worthy of note, however, that in two recent situations bearing some similarity to the instant case, the Board has held successors accountable to remedy unfair labor practices of predecessor employers. *Eldorado, Inc.*, 335 NLRB 952 (2001); *American Signature, Inc.*, 334 NLRB 880, 882 (2001).